IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 378 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT - Appellant
Versus
RAJENDRAKUMAR NAGINDAS SHAH - Respondent

==========

Appearance :
MR. M.A. PATEL, LD. APP for Appellant :
MR NITIN M AMIN for Respondent :

==========

CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 10/01/2007

ORAL JUDGMENT

1. The State of Gujarat – The Appellant has preferred this appeal under Section 378 of the Code of Criminal Procedure, 1973 [herein after

referred to as “The Code” for brevity] challenging the order of acquittal dated 24/1/1997 passed by learned JMFC, Wadhwan, District Surendranagar, in Criminal Case No. 326 of 1990, acquitting the present respondent / original accused No.1 of the charge of committing offence punishable under Section 406 r/w section 114 of I.P. Code [herein after referred to as “IPC” for short]. This order of acquittal dated 24/1/1997 passed by learned JMFC, Wadhwan, in Criminal Case No. 326 of 1990 is impugned in the present appeal. This Court (Coram:N.N. Mathur, J) on 6/5/1997 granted leave and admitted the appeal. Today the same was taken up for final disposal.

2. The facts in brief leading to filing the appeal deserve to be set out as under:-

2.1 The prosecution witness no.2- wife had filed complaint before the concerned Magistrate against original accused no.1-husband and accused no.2 – mother-in-law alleging commission of offence punishable under section 406 r/w section 114 of I.P. Code as the accused did not return the Sridhan and the goods given to her by her parents on her marriage to accused no.1. Said complaint was registered as Case No. 1 of 1989 and the learned Magistrate at the relevant time had ordered inquiry under Section 156 (3) of the Code of Criminal Procedure. The police registered the

case as M. Case No.1 of 1989 and charge sheet came to be filed in the court of learned JMFC, Wadhwan against both the accused no.1 & 2 for commission of offence punishable under section 406 r/w 114 of I.P. Code. Learned JMFC, Wadhwan on 21/7/1990 vide exhibit-2 framed charge against both the accused for commission of offence under section 406, r/w 114 of I.P. Code, as the accused did not return the Sridhan of the witness no.2, the wife, which she had carried with her on her marriage to accused no.1. The plea of accused no.1 denying the charge was recorded at exhibit-3 and plea of accused no.2 denying charge is recorded at exhibit-4. Both the accused claimed to be tried. Accordingly the trial court recorded evidence led by the prosecution and recorded further statement of the accused under section 313 of Cr.P.C. In further statement also both the accused denied case of the prosecution.

2.2 The trial court after making detailed analysis of the evidences adduced by the prosecution came to the conclusion that he prosecution could not prove its case beyond reasonable doubt and therefore, accused no.1 was given benefit of doubt and accused no.2 was honourably acquitted vide its order dated 24/1/1997 which is impugned in the present appeal by the Stat of Gujarat.

2.3 Learned APP Shri. Patel has submitted that

the order of learned JMFC acquitting the accused being erroneous and contrary to the material on record deserves to be quashed and set aside. Shri. Patel vehemently submitted that the trial court has patently erred in not appreciating the evidence adduced by the prosecution so as to bring home the guilt on the part of the accused. Shri. Patel submitted that the trial court has erred in not appreciated the fact that the witnesses deposed to the effect that PW-2 wife and original complainant was given the goods and articles mentioned in the list at exhibit-33 and as the accused have not proved that the same were returned, the offence punishable under section 406 r/w section 114 of I.P. Code was complete. The trial court has therefore erred in acquitting the accused. Shri. Patel has submitted that the order of acquittal impugned in the present appeal is otherwise also erroneous and therefore the same deserve to be quashed and set aside. Shri. Patel submitted that the record and evidence go to show that the accused no.1 had committed the offence under section 406 read with section 114 of I.P.Code and therefore, he be convicted and appropriate punishment be imposed upon him.

2.4 Shri. Amin, learned counsel appearing for the respondent submitted that the trial court has rightly recorded acquittal of the accused. The trial court has in its judgment recorded in para-13 that at the stage of argument learned APP

appearing for the prosecution had withdrawn the charge against accused no.2 as there was no evidence against accused no.2. Shri. Amin has submitted that looking to the evidence on record and the charge it can well be said that the prosecution has not attributed and articulated any specific role against each of the accused in commission of offence punishable under section 406 and 114 of I.P. Code. The deposition of the witnesses and the evidence adduced go to show that all along it was deposed by the witnesses without articulating and attributing any role to any of the accused that the accused were responsible for commission of offence punishable under section 406 and 114 of I.P. Code. Shri. Amin has relied upon decision of the Apex Court in case of BALAKA SINGH AND OTHERS VS. THE STATE OF PUNJAB, reported in AIR 1975 S.C. pg. 1962 in support of his submission that when the evidence is inextricable and some of the accused are acquitted the case of the prosecution deserves to be discarded in respect of the convicted accused also and the conviction can not be sustained looking to the evidence and the nature of evidence.

2.5 Shri. Amin has further submitted that the trial court has rightly given benefit of doubt to accused no.1 and acquitted accused no.2 honourably looking to the testimony of witnesses. The prosecution has absolutely failed in proving its case beyond doubt. Shri. Amin invited attention of

this Court to the contradictions in respect of the fact of Rs.5000=00 alleged to have been given to the accused by parents of original complainant & witness no.2 wife. The witnesses have not been consistent in their version in respect of Rs.5000=00 and therefore the defence can well be said to have been successful in raising doubt in case of the prosecution. It also deserves to be noted that the prosecution has miserably failed in adducing any cogent evidence so as to bring home guilt on the part of the accused and therefore, the trial court has noted in para-13 of the judgment that the concerned APP had fairly conceded that there was no evidence against accused no.2 and the charge was therefore not tenable. In view of these, when there is no articulate role attributed upon each of the accused by the prosecution the present respondent against whom acquittal appeal is filed can not be held guilt. The Apex Court decision in case of Balaka Singh (supra) is on all its fours applicable to the facts of the present case also. Shri. Amin has submitted that this being an acquittal appeal under section 378 of the Code of Criminal Procedure, the order of acquittal, unless it is patently demonstrated by the appellant that it has resulted into miscarriage of justice, is not required to be interfered with in this acquittal appeal.

3. This Court has perused the record and evidence

and heard learned counsels of the parties. The following emerge from the perusal of record and submissions of the counsels:-

i) The prosecution witness no.2, wife married accused no.1 only in the year 1983. Prior to the marriage in the year 1982 the engagement ceremony had taken place. The wife gave birth to female child in the year 1983 at her parents home.

ii) After delivery of baby when wife had been taken to her matrimonial home she was not accepted and therefore she had to return to her parental house with her relatives who had accompanied her to her husband's place.

iii) The wife thereafter had filed proceedings for maintenance and she had started receiving maintenance to the tune of Rs.700=00 per months.

iv) Thereafter wife filed proceedings for obtaining divorce which also were over and the divorce was granted.

v) The wife after getting divorce appears to have lodged the complaint with the competent court only in the year 1989 which came to be numbered as Case No. 1/89 wherein the order

of inquiry under section 156(3) was ordered for lodging commission of offence punishable under section 406 and 114 of I.P. Code.

vi)The prosecution witness no.1 whose testimony is recorded at exhibit-15 happened to be cousin of the original complainant wife, PW-2. This witness has stated that the original complainant wife was betrothed to accused no.1 in the year 1982 and she was married to accused no.1 in the year 1983 and at that time dowry was given as per the list. The Fixed Deposit Receipt ('FDR for short) was given to accused no.1. That FDR was made by brother of the complainant wife. This witness has narrated that other article like cupboard, utensils, cot, chairs etc. were given. He has stated that he did not remember as to who had prepared the list. In his cross examination this witness admitted that for the purpose of betrothal the bridegroom side goes to the place of bride. This witness admitted in his cross examination that he did not remember when the complainant wife was brought to her parents home, whether she had brought the ornaments or not. He admitted that he did not know as to whether FDR was taken after the marriage or before the marriage. He admitted that receipt was in the name of the complainant and accused no.1 husband. He

denied the suggestion that it was taken out by accused no.1 in joint name after the marriage. He had admitted the fact that receipt was capable of being encashed by either of the holders. He pleaded ignorance as to whether accused no.1 had encashed the same or not. He also admitted in his cross examination that in his police statement he has not mentioned about Rs.5000=00 FDR nor did he mention about he ornaments, nor did he mention about dowry worth Rs.44,000=00 to 45,000=00. He also admitted that he was not sure which were the items given in the dowry.

4. The complaint wife is examined at exhibit-16 as PW-2. The wife has stated that she had to be brought to her parental home as she had fallen sick during her pregnancy. The wife / original complainant stated that the ornaments used to remain in the locker of the accused. In her cross examination this witness stated that she did not remember as to whether she had mentioned about her Sridhan and ornaments etc. in the maintenance application. She has admitted that there is no mention in the complaint that gold ornaments were kept in the locker. She admitted that the articles were not kept in possession by the accused. She further admitted that the articles given to her during her marriage ceremony, there were Sridhan and she is owning

it and she was in possession thereof. She admitted that she had accompanied the police to her in-laws and at that time nothing was found. She also admitted that nothing was found in the locker of the accused. She admitted that it is true that there is no mention in her complaint that even the articles were used by the accused. She admitted that the list at Schedule A & B were not original and are xerox copies. She denied the suggestion that the lists were bogus.

5. Daneshbhai Chimanlal, PW-3, happens to be real brother of the complainant wife. He states that the lists were prepared in two copies, one was given to in-laws and one was kept with them. The xerox copy of the list is produced. He has stated that before delivery as his sister had fallen sick she was required to be brought at her parental place where she delivered the child. This witness has stated that after divorce case was over they demanded the goods and Sridhan but it was not returned to them. This witness has stated in respect of Rs.5000=00 that even before filing complaint the parties had arrived at a compromise at Kantibhai's place but it did not come through on account of FDR amount of Rs.5,000=00 which was given to his sister by way of dowry. He did not remember as to who had taken out the FDR in respect of Rs.5,000=00. He in his cross examination admitted that Rs.5,000=00 of FDR were paid by

her father through cheque and the counter foil of the cheque was with him. However he did not remember as to when his father gave that money. He also did not remember as to when the money was given, whether prior to marriage or after marriage. He says that from reading of counter foil he understood that Rs.5000=00 was towards dowry. He says that counter was produced before the police but police did not return the same. He did not remember as to which bank the cheque was drawn and on which date. He admitted that before lodging complaint his sister was staying with them since last 6 to 7 years.

6. PW-4 Jayantilal Kevaldas Bhavishi is the neighbour of the complainant, who has attempted to help the case of the prosecution. However in his cross examination he has stated that he would not remember as to when his statement was taken by the police.

7. PW-5 is Dushyantbhai Satyaswaroop, whose testimony is recorded at exhibit-21. He is also a neighbour and he had tried to support the case of the prosecution by narrating the article of dowry. However he has not narrated as to how he could witness the delivery of such articles. In his cross examination it has come out that he did not remember as to what exactly was given as dowry.

8. PW-6 Premilaben Rasiklal Bhavishi happens to be aunt of original complainant at whose testimony an attempt was made to produce the list but as it was only taken on record as Mark-A. This witness has stated in her testimony that once Ilaben had brought the entire dowry. However as the compromise did not go through same was taken back.

9. PW-7 Indumatiben Kantilal Vora, whose testimony is recorded at exhibit-32 has claimed to have been the author of the list.

10. Against the aforesaid backdrop decision of acquittal deserves to be viewed. It is important to note that the prosecution has not attributed any specific role to any of the accused. All along in all the testimonies the accused have been referred to as accused collectively, baring at one place when they have referred A.1, at no other place any specific role is attributed to any of the accused. Therefore the decision of the apex court in case of Balaka Singh (supra) would have applicability in the present case also. The Apex Court in case of Balaka Singh (supra) has observed as under in para-8 of the judgment:-

" Para-8: The suggestion of the appellants is that they were falsely implicated because the prosecution could not succeed in convicting

Balaka Singh for the murder of Gurnam Singh in the previous murder case. It was to wreak fresh vengeance on the accused that they had been falsely implicated in the present case. It is true that there are as many as eight witnesses who are alleged to have seen the occurrence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons acquitted by the High Court equally with the appellants making absolutely no distinction between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricably mixed up that it is not possible to sever one from the other. It is true that, as laid down by this Court in Zwinglee Ariel v. State of Madhya Pradsh, AIR 1954 SC 15 = (1954 Cri L.J. 230) and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the

prosecution by divorcing th essential details presented by the prosecution completely from the context and the background against which they are made them this principle will not apply... “

It also deserve to be noted that the prosecution has conceded before the trial court that for want of evidence against accused no.2 the charge deserved to be dropped.

11. Against this backdrop, in light of Apex Court decision it can well be said that the impugned decision of the trial court acquitting the accused is just and proper.

12. It also deserves to be noted that the testimony of the witness wife as set out herein above also go to show that the prosecution had failed in establishing its case beyond reasonable doubt so as to bring home guilt on the part of the accused. This being an acquittal appeal unless & until it is established by the appellant that sustaining the order of acquittal would result into miscarriage of justice, the same can not be interfered with under section 378 of the Code of Criminal Procedure. The defence has been successful in raising serious doubt against the case of the prospection and therefore the trial court is justified in giving benefit of doubt to accused no.1. So far as accused no.2 is concerned, it is the case of the prosecution

that no evidence was available and the charge itself deserved to be dropped against her. In light of these observations this Court is of the considered view that the order of the trial court does not call for any interference.

13. In view of the aforesaid discussions, this Court is of the considered view that the order of acquittal dated 24/1/1997 passed by learned JMFC, Wadhwan, District Surendranagar, in Criminal Case No. 326 of 1990 does not call for any interference in this appeal under Section 378 of the Code of Criminal Procedure. The appeal, therefore fails, and is accordingly dismissed.

[S.R. BRAHMBHATT, J]

/vgn